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No. 1171

In the Supreme Court of the United States

OCTOBER TERM, 1944

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 53–56) are not officially reported. The opinion of the circuit court of appeals (R. 63–71) is reported in 147 F. 2d 658.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 15, 1945 (R. 71). The

petition for a writ of certiorari was filed on April 16, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the district court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior trial and adjudication of the issue whether petitioner is subject to the Fair Labor Standards Act.

2. Whether enforcement of the subpoena would violate the freedom of press guaranteed by the First Amendment to the Constitution.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

Upon the refusal of petitioner to permit any inspection of its records by the Wage and Hour Division, a subpoena duces tecum signed by the Administrator of the Division was duly served on the business manager of petitioner's two newspapers, on November 3, 1943, requiring petitioner to appear before a designated representative of the Division at a specified place in Muskogee,

Oklahoma, on November 17, 1943, to produce certain specified records and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938 regarding complaints of violations by said company * * *" (R. 9–12, Exs. B and C). The records called for were petitioner's wage and hour records for employees of its two newspapers during a particular period and the "books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods" (R. 11).

Petitioner refused to comply with the subpoena on the ground that it believed the Act to be inapplicable to its business (R. 12–14). The Administrator thereupon applied to the district court for an order directing compliance with the subpoena. The application (R. 5–9) alleged, on information and belief, that petitioner publishes two daily newspapers and is engaged in the production of goods for interstate commerce and in commerce within the meaning of the Act, and that all the books, papers and documents referred to in the subpoena were relevant and material "to determine whether the company has violated [the Act] * * * and will aid in the enforcement of the provisions of the Act" (R. 8).

In response to an order to show cause why the subpoena should not be enforced (R. 14–15), petitioner admitted that it publishes two daily newspapers, that it receives out-of-State news and advertisements which it prints in its newspapers, and that 137 papers are sent daily to members of the armed forces serving in other states and overseas and 67 daily to out-of-State advertisers (R. 19, 54–55, Deft. Exs. C, D, E, F, R. 41–49). Petitioner challenged the jurisdiction of the court and contended, as summarized by the district court (R. 53–54), "that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company is not engaged in commerce or in the production of goods for commerce within the meaning of the Act; and that its employees are not engaged in commerce or in the production of goods for commerce."

The district court granted the Administrator's application and issued an order requiring the production of the records specified in the subpoena (R. 56–57). On the authority of *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, the court ruled that petitioner's business was subject to the Act. It concluded that it had jurisdiction of the proceedings "under the provisions of the Act, and under the facts admitted herein" and that no reason had been shown for withholding a compliance order (R. 55–56).

The circuit court of appeals affirmed (R. 63–71). It held that petitioner "is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena" (R. 69). Relying upon the decision in the Eighth Circuit in *Walling* v. *Benson,* 137 F. 2d 501, certiorari denied, 320 U. S. 791, the court stated that the Administrator must show "probable cause" or "that reasonable grounds exist for making the investigation" (*ibid.*), but that "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act" (R. 70). The application and the accompanying affidavits in the instant case were held to furnish a sufficient showing of "reasonable grounds." Petitioner's further contention that the enforcement of the subpoena would violate the First Amendment was rejected on the ground that newspaper publishers are not immune from the application of general laws, and that the regulations "imposed upon those covered by the Fair Labor Standards Act are not an abridgment of the freedom of the press" (R. 71).

ARGUMENT

The main issue in this case is the same as the issues presented in three cases in which this Court has denied certiorari: *Standard Dredging Corp.* v. *Walling,* 319 U. S. 761; *Mississippi Road Sup-*

ply Co. v. *Walling*, 320 U. S. 752; *Benson* v. *Walling*, 320 U. S. 791. In each case the petition was opposed by the Government on the ground that this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, should be regarded as controlling and as having resolved any conflict between the decisions of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596. In the interval since this Court's denial of certiorari in the above cases, the circuit courts of appeals for the Tenth Circuit (in the instant case), the Third Circuit (*Walling* v. *News Printing Co.*, No. 1179, this Term, pending on petition for writ of certiorari), and apparently even the Sixth Circuit (*Walling* v. *LaBelle Steamship Co.*, 8 Wage Hour Rept. 353),[1] have joined the other circuits in ruling that the Administrator is entitled to judicial enforcement of a subpoena without a prior hearing or determination of the issue whether the employer is subject

[1] While the *LaBelle* decision does not expressly overrule the *General Tobacco* decision, it clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena. The *LaBelle* opinion states that the Administrator "is entitled to the desired order without the necessity of an actual showing that the employer proceeded against is clearly within the provisions of the Act" where he has "reasonable grounds" to believe the employer is covered or that the latter has information essential to the investigation. 8 Wage Hour Rept. at 354.

to the Fair Labor Standards Act.[2] Although the courts in some circuits have stated that there should be a showing of "reasonable grounds" for investigation while others have not required any such showing, and although the courts have expressed various views regarding the extent of the applicability of the *Endicott Johnson* decision to the Fair Labor Standards Act, all of the circuit courts of appeals are now in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior trial and determination of the issue of coverage. Contrary to petitioner's assertion, therefore (see Pet. 5, 10–11), there is plainly no conflict among the circuits on the issue presented on this record.

There is no more reason for granting the petition for certiorari in this case than there was in the *Standard Dredging, Mississippi Road Supply,* and *Benson* cases, *supra.* There is even less occasion for granting the petition here than there

[2] *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2); *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8), certiorari denied, 320 U. S. 791; *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming*, 119 F. 2d 209 (C. C. A. 5); reversed on the same ground, 315 U. S. 357.

was in a case like the *Standard Dredging* case, because here the court adopted and applied the view that the Administrator must make a showing of "reasonable grounds" for making the investigation—a requirement which was not imposed by the *Standard Dredging* decision. *In re Standard Dredging Corp.*, 44 F. Supp. 601, 602, affirmed 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761; see also *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1).

Petitioner, in its status as a newspaper publisher, further challenges the decision below on the ground that the enforcement of the subpoena will constitute an abridgment of the freedom of press guaranteed by the First Amendment (Pet. 6, 14–15). But, as the circuit court of appeals pointed out (R. 71): " 'The publisher of a newspaper has no special immunity from the application of general laws,' *Associated Press* v. *Labor Board*, 301 U. S. 103, including the Fair Labor Standards Act." In *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445, in which this Court denied a petition for certiorari (322 U. S. 728), the identical contention that the application of the Act to a newspaper violates its constitutional rights was rejected by the circuit court of appeals for the Sixth Circuit. Every circuit court of appeals and district court which has considered the question has taken the same view.[3]

[3] In addition to the decision below, see *Walling* v. *News Printing Co.*, 8 Wage Hour Rept. 270 (C. C. A. 3), No. 1179

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MAY 1945.

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this Term, pending on petition for a writ of certiorari; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed per curiam, 315 U. S. 784; *Walling* v. *Evening Post Publ. Co.*, 8 Wage Hour Rept. 431 (E. D. S. C.). The district court in the instant case made a similar ruling, and in the *News Printing* case, although the district court refused an enforcement order on the ground that coverage had not been proved, it held that there was no merit in the constitutional objections raised by the respondent newspaper.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all

the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * * * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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